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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Randy M. Montgold,

No. CV-18-02074-PHX-JAT

10 Plaintiff,

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

15 Pending before the Court is Plaintiff's appeal of the denial of his application for
16 social security disability benefits. Plaintiff makes the following claims of error on appeal:
17 1) the Administrative Law Judge ("ALJ") failed to give germane reasons for discounting
18 the testimony of 3 lay witnesses; 2) the ALJ failed to ask the appropriate questions of the
19 vocational expert; 3) the ALJ failed to discuss Plaintiff's cubital tunnel syndrome; and 4)
20 the ALJ failed to explain his decision sufficiently with respect to Plaintiff's mental residual
21 functional capacity. (Doc. 19 at 1). Plaintiff seeks, "remand[] for further proceedings
22 including a de novo hearing and new decision." (Doc. 19 at 25).

23 **I. Legal Standard**

24 **A. Standard of Review on Appeal**

25 The ALJ's decision to deny benefits will be overturned "only if it is not supported
26 by substantial evidence or is based on legal error." *Magallanes v. Bowen*, 881 F.2d 747,
27 750 (9th Cir. 1989) (internal quotation omitted). "Substantial evidence" means "more than
28 a mere scintilla, but less than a preponderance." *Reddick v. Chater*, 157 F.3d 715, 720 (9th

1 Cir. 1998) (internal citation omitted). In other words, substantial evidence means “such
2 relevant evidence as a reasonable mind might accept as adequate to support [the ALJ’s]
3 conclusion.” *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009).

4 “The inquiry here is whether the record, read as a whole, yields such evidence as
5 would allow a reasonable mind to accept the conclusions reached by the ALJ.” *Gallant v.*
6 *Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984) (internal citation omitted). In determining
7 whether there is substantial evidence to support a decision, the Court considers the “record
8 as a whole, weighing both the evidence that supports the ALJ’s conclusions and the
9 evidence that detracts from the” ALJ’s conclusions. *Reddick*, 157 F.3d at 720. “Where
10 evidence is susceptible of more than one rational interpretation, it is the ALJ’s conclusion
11 which must be upheld; and in reaching his findings, the ALJ is entitled to draw inferences
12 logically flowing from the evidence.” *Gallant*, 753 F.2d at 1453 (internal citations
13 omitted); *see Batson v. Comm’r of the Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir.
14 2004). This is because “[t]he trier of fact and not the reviewing court must resolve conflicts
15 in the evidence, and if the evidence can support either outcome, the court may not substitute
16 its judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992);
17 *see Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990).

18 The ALJ is responsible for resolving conflicts in medical testimony, determining
19 credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
20 Cir. 1995). Thus, if on the whole record before the Court, substantial evidence supports the
21 ALJ’s decision and the decision is free from legal error, the Court must affirm it. *See*
22 *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989); *see also* 42 U.S.C. § 405(g) (2012).
23 On the other hand, the Court “may not affirm simply by isolating a specific quantum of
24 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (internal quotation
25 and citation omitted).

26 Notably, the Court is not charged with reviewing the evidence and making its own
27 judgment as to whether Plaintiff is or is not disabled. *See Connett v. Barnhart*, 340 F.3d
28 871, 874 (9th Cir. 2003). Rather, the Court’s inquiry is constrained to the reasons asserted

1 by the ALJ and the evidence relied upon in support of those reasons. *See id.*

2 **B. Definition of Disability**

3 To qualify for disability benefits under the Social Security Act, a claimant must
4 show that, among other things, he is “under a disability.” 42 U.S.C. § 423(a)(1)(E). The
5 Social Security Act defines “disability” as the “inability to engage in any substantial gainful
6 activity by reason of any medically determinable physical or mental impairment which can
7 be expected to result in death or which has lasted or can be expected to last for a continuous
8 period of not less than 12 months.” *Id.* § 423(d)(1)(A).

9 A person is “under a disability only if his physical or mental impairment or
10 impairments are of such severity that he is not only unable to do his previous work but
11 cannot, considering his age, education, and work experience, engage in any other kind of
12 substantial gainful work which exists in the national economy.” *Id.* § 423(d)(2)(A).

13 **C. The Five-Step Evaluation Process**

14 To evaluate a claim of disability, the Social Security regulations set forth a five-step
15 sequential process. 20 C.F.R. § 404.1520(a)(4) (2016); *see also Reddick*, 157 F.3d at 721.
16 A finding of “not disabled” at any step in the sequential process will end the inquiry.
17 20 C.F.R. § 404.1520(a)(4). The claimant bears the burden of proof through the first four
18 steps, but the burden shifts to the Commissioner in the final step. *Reddick*, 157 F.3d at 721.
19 The five steps are as follows:

20 1. First, the ALJ determines whether the claimant is “doing substantial gainful
21 activity.” 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled.

22 2. If the claimant is not gainfully employed, the ALJ next determines whether
23 the claimant has a “severe medically determinable physical or mental impairment.” *Id.*
24 § 404.1520(a)(4)(ii). To be considered severe, the impairment must “significantly limit[]
25 [the claimant’s] physical or mental ability to do basic work activities.” *Id.* § 404.1520(c).
26 Basic work activities are the “abilities and aptitudes to do most jobs,” such as lifting,
27 carrying, reaching, understanding, carrying out and remembering simple instructions,
28 responding appropriately to co-workers, and dealing with changes in routine. *Id.*

1 § 404.1521(b). Further, the impairment must either have lasted for “a continuous period of
2 at least twelve months,” be expected to last for such a period, or be expected “to result in
3 death.” *Id.* § 404.1509 (incorporated by reference in 20 C.F.R. § 404.1520(a)(4)(ii)). The
4 “step-two inquiry is a de minimis screening device to dispose of groundless claims.”
5 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not have a
6 severe impairment, then the claimant is not disabled.

7 3. Having found a severe impairment, the ALJ next determines whether the
8 impairment “meets or equals” one of the impairments listed in the regulations. 20 C.F.R. §
9 404.1520(a)(4)(iii). If so, the claimant is found disabled without further inquiry. If not,
10 before proceeding to the next step, the ALJ will make a finding regarding the claimant’s
11 “residual functional capacity based on all the relevant medical and other evidence in [the]
12 case record.” *Id.* § 404.1520(e). A claimant’s “residual functional capacity” (“RFC”) is the
13 most he can still do despite all his impairments, including those that are not severe, and
14 any related symptoms. *Id.* § 404.1545(a)(1).

15 4. At step four, the ALJ determines whether, despite the impairments, the
16 claimant can still perform “past relevant work.” *Id.* § 404.1520(a)(4)(iv). To make this
17 determination, the ALJ compares its “residual functional capacity assessment . . . with the
18 physical and mental demands of [the claimant’s] past relevant work.” *Id.* § 404.1520(f). If
19 the claimant can still perform the kind of work he previously did, the claimant is not
20 disabled. Otherwise, the ALJ proceeds to the final step.

21 5. At the final step, the ALJ determines whether the claimant “can make an
22 adjustment to other work” that exists in the national economy. *Id.* § 404.1520(a)(4)(v). In
23 making this determination, the ALJ considers the claimant’s “residual functional capacity”
24 and his “age, education, and work experience.” *Id.* § 404.1520(g)(1). If the claimant can
25 perform other work, he is not disabled. If the claimant cannot perform other work, he will
26 be found disabled.

27 In evaluating the claimant’s disability under this five-step process, the ALJ must
28 consider all evidence in the case record. *See id.* §§ 404.1520(a)(3), 404.1520b. This

1 includes medical opinions, records, self-reported symptoms, and third-party reporting. *See*
2 20 C.F.R. §§ 404.1527, 404.1529; SSR 06-3p, 71 Fed. Reg. 45593-03 (Aug. 9, 2006).

3 **II. Claims of Error on Appeal**

4 **A. Lay Witness Testimony**

5 Defendant recounts the law governing consideration of lay witness testimony as
6 follows:

7 ALJs must consider testimony from lay witnesses submitted on behalf of a
8 claimant. 20 C.F.R. § 416.929(c)(3). The Commissioner's regulations do not
9 require any explicit discussion of lay witness testimony in the ALJ's
10 decision. *See* Social Security Ruling (SSR) 06-03p, available at 2006 WL
2329939 (recognizing that "there is a distinction between what an adjudicator
must consider and what the adjudicator must explain in the disability
determination or decision").

11 (Doc. 23 at 5).

12 However, Plaintiff notes that, in this Circuit, notwithstanding the regulations,

13 ...in 2006 this Circuit held that the ALJ had erred by neglecting to comment
14 on competent lay witness testimony. *Stout v. Comm'r, Soc. Sec. Admin.*, 454
15 F.3d 1050, 1054 (9th Cir. 2006). ... an ALJ may only discount the opinion
of a lay witness if he provides germane reasons for doing so. ... *Turner v.*
Comm'r of Soc. Sec., 613 F.3d 1217, 1224 (9th Cir. 2010); SSR 06-03p.

16 (Doc. 24 at 4-5).

17 **1. Sherry Montgold**

18 Plaintiff's mother offered testimony regarding Plaintiff's abilities. The ALJ
19 recounted this testimony in his opinion. (Doc. 18-3 at 23-24).¹ When the ALJ first begins
20 discussing Mrs. Montgold's testimony, her refers to her as claimant's mother. (*Id.* at 23).
21 However, when the ALJ makes his credibility assessment of Mrs. Montgold, he discounts
22 her observations because, "... by virtue of the relationship as the spouse of the claimant,
23 she cannot be considered a disinterested third party." (*Id.* at 24). Because the ALJ seems
24 to have had some confusion about who Mrs. Montgold is in Plaintiff's life, and discredited
25 her based on that relationship, the Court finds the ALJ did not give a reason germane to
26 this witness for discounting her testimony.

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28 ¹ All page citations are to this Court's electronic record, not the pages of the administrative transcript.

2. Melba Media, R.N.

Ms. Media, who examined Plaintiff, offered her opinions about Plaintiff's limitation. (Doc. 19 at 9). The ALJ gave this opinion, "little weight" because, "Ms. Media is not an acceptable medical source pursuant to the rules and regulations of the Social Security Administration, so her opinion cannot be given great weight." (Doc. 18-3 at 27).

Plaintiff argues that Ms. Media is the equivalent of a lay witness; thus, the ALJ must give a germane reason to discount her testimony. Defendant does not dispute that Ms. Media qualifies as a lay witness. (Doc. 23 at 6). Defendant argues that the ALJ gave Ms. Media's opinion little weight because it conflicted with other evidence. (*Id.* (citing Tr. 26)). The Court cannot ascertain the basis for Defendant's argument as the ALJ never makes this statement that the Court can locate.

Thus, the only reason articulated by the ALJ for discounting Ms. Media's opinions is that she is not an acceptable medical source. As this reason would apply to all lay witnesses, but lay witness testimony is nonetheless to be considered, the Court finds that the ALJ failed to give a germane reason for discounting this Ms. Media's testimony.

3. Joseph L. Burridge, Vocational Evaluation Specialist

Plaintiff argues it was error for the ALJ to fail to mention the opinions of Joseph L. Burridge, a vocational evaluation specialist. (Doc. 19 at 14-15). Defendant does not dispute that it was error for the ALJ to fail to mention the testimony of this lay witness. (Doc. 23 at 7). However, Defendant argues that the error was harmless. (*Id.*). The Court will discuss in the context of the vocational expert below whether this error was harmless.

B. Vocational Expert's Testimony

Plaintiff makes two claims of error regarding the vocational expert's ("VE") testimony. The first claim of error is that the jobs identified by the VE as being jobs Plaintiff can perform are inconsistent with Plaintiff's residual functional capacity. The second claim of error is that the hypothetical containing Plaintiff's residual functional capacity posed to the VE by the ALJ was inaccurate because the ALJ failed to assess and include Plaintiff's cubital tunnel syndrome.

1. Jobs Identified by the Vocational Expert

2 Plaintiff claims that the VE erred in identifying the jobs Plaintiff could perform in
3 part because Plaintiff was limited to “simple, repetitive tasks,” but all but one of the jobs
4 identified by the VE required Level 3 Reasoning. (Doc. 19 at 22). Plaintiff then notes: “In
5 2015, this Circuit held, ‘[t]oday, we join the Tenth Circuit and hold that there is an apparent
6 conflict between the residual functional capacity to perform simple, repetitive tasks, and
7 the demands of Level 3 Reasoning.’ *Zavalin v. Colvin*, 778 F.3d 842, 846–47 (9th Cir.
8 2015).” (*Id.*). Plaintiff argues it was error for the ALJ to not ask the VE how Plaintiff’s
9 limitation to simple, routine and repetitive tasks would impact his ability to perform the
10 jobs the VE identified. (*Id.*). Defendant did not respond to this argument. (Doc. 23 at 8).
11 In view of the holding of *Zavalin*, the Court agrees that the ALJ’s failure to seek
12 clarification on this point was error.

13 Additionally, Plaintiff claims it was error for the ALJ to advise the VE that Plaintiff
14 had a high school diploma without specifying that the diploma was earned in special
15 education classes. (Doc. 18-3 at 80). Because the VE is supposed to take into account
16 Plaintiff's education, the Court finds the failure to fully inform the VE on this point was
17 error.

18 Plaintiff also argued it was error for the ALJ to determine that Plaintiff could
19 perform the jobs of cashier II, self service gas station cashier, toll booth collector, and ticket
20 taker when Plaintiff was limited to “only incidental contact with the public.” (Doc. 19 at
21 24). Citing nothing, Plaintiff states, “It is difficult to imagine how the kind of contact
22 required with the public in these jobs could possibly be ‘incidental.’” (*Id.*).

23 The Court has read the transcript and notes the VE specifically asked the ALJ to
24 repeat and clarify Plaintiff's limitation with respect to contact with the public. (Doc. 18-3
25 at 82). The ALJ repeated the "incidental only" limitation. (*Id.*). The VE nonetheless
26 determined, in his expert opinion, that Plaintiff could perform these jobs. As a matter of
27 ordinary English, the Court tends to agree with Plaintiff. However, nothing in this record
28 or the law cited by Plaintiff would permit this Court to substitute its judgment of what

1 would be “incidental” for the opinion of the expert.

2 Nonetheless, the ALJ did have the benefit of another vocational evaluation from Mr.
3 Burridge, which the ALJ failed to discuss. Given the ambiguities between Plaintiff’s
4 residual functional capacity and the testimony of the VE in this case, the Court cannot
5 conclude that the failure of the ALJ to consider or give germane reasons for disregarding
6 the testimony of another lay witness regarding Plaintiff’s vocational abilities was harmless
7 error.

8 **2. Plaintiff’s Residual Functional Capacity – Cubital Tunnel
9 Syndrome**

10 Plaintiff argues on appeal that the hypothetical posed to the vocational expert was
11 inadequate because it failed to include any limitations based on Plaintiff’s cubital tunnel
12 syndrome. (Doc. 19 at 21). More broadly, Plaintiff argues that the ALJ erred at Step 2
13 because he failed to consider Plaintiff’s cubital tunnel syndrome. (*Id.* at 19-21).
14 Specifically, at Step 2, the ALJ failed to mention cubital tunnel syndrome which Plaintiff
15 argues is moderate to severe. (*Id.* at 19).

16 Defendant responds and argues that, “A claimant does not establish that the
17 Commissioner’s step five determination is incorrect by simply stating that the ALJ
18 improperly evaluated her impairments.” (Doc. 23 at 8) (citing *Stubbs-Danielson v Astrue*,
19 539 F.3d 1169, 1175-76 (9th Cir. 2008). Here, however, Plaintiff is arguing more than a
20 re-weighing of the evidence; Plaintiff is arguing the ALJ completely overlooked an
21 impairment.

22 Because the ALJ did not mention this impairment, the Court cannot know if the ALJ
23 considered it but found it to not be severe at Step 2 or failed to appreciate this additional
24 diagnosis. Because the Court cannot determine why the ALJ failed to include or disregard
25 this alleged impairment, the Court finds there was error at Step 2 in failing to mention it.

26 **C. Plaintiff’s Mental Residual Functional Capacity**

27 Based on the foregoing errors, the Court has determined this case must be remanded
28 for a de novo hearing. Accordingly, the Court need not address Plaintiff’s final claim of

1 error regarding the ALJ's consideration and treatment of Plaintiff's mental residual
2 functional capacity. Either party may make whatever arguments the deem appropriate on
3 this issue on remand.

4 **III. Conclusion**

5 Based on the foregoing,

6 **IT IS ORDERED** that the decision of the ALJ is reversed, this case is remanded
7 for further proceedings including a de novo hearing and a new decision; the Clerk of the
8 Court shall enter judgment accordingly.

9 Dated this 26th day of June, 2019.

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14 James A. Teilborg
15 Senior United States District Judge
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